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Supreme Court of the United States

OCTOBER TERM, 1964

DAVID CRYSTAL, INC.,

Respondent,

—against—

THE CUNARD STEAM-SHIP COMPANY LIMITED,

Respondent,

—against—

JOHN T. CLARK AND SON,

Petitioner,

—and—

PENSON & COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HORACE T. ATKINS
Proctor for Petitioner
[illegible] Pine Street
New York, N. Y., 10005

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner seeks a writ of Certiorari to review a judgment of the Court of Appeals for the Second Circuit, and, in support of its petition shows:

Jurisdiction

This Court has jurisdiction under Title 28, U. S. Code, Sec. 1254.

Opinion Below

The Opinion of the Court of Appeals is officially reported at 339 F. 2d 295 and is set forth in the appendix to this Petition. The opinion of the District Court for the Southern District of New York is officially reported at 223 F. Supp. 273 and is unofficially reported at 1964 American Maritime Cases 1292.

The Court of Appeals rendered its judgment, one judge both concurring and dissenting, on December 9, 1964 and judgment was entered that day.

Questions Presented

1. In a stevedoring and terminal operation contract between a steamship company and a stevedore, should a clause exonerating the stevedore from liability for a specified breach of its implied warranty of workmanlike performance be strictly construed against the stevedore?

2. To evoke equitable estoppel by holding the employer accountable for the act of his employee, is it sufficient that the employee have mere possession, in the course of his employment, of a document used in perpetrating fraud on an innocent third party?

3. Is the "proper delivery" requirement of the Harter Act (46 U. S. C. Section 190) fulfilled when the ocean carrier discharges the goods on a fit and customary wharf and into the custody of an independent terminal operator in possession and control of the pier, due notice of the arrival of the goods having been given to the consignee prior to the arrival of the vessel and discharge of the goods?

4. Should a non-negligent ocean carrier and its terminal operator be liable for a loss which resulted when cargo was fraudulently obtained from the wharf by means of a forged delivery order which had been stolen from the consignee's agent, particularly where the bill of lading contract of carriage exempted "the Act of Thieves"?

5. Is an ocean carrier entitled to the benefit of a £20 per package valuation clause where the loss occurred after discharge on the wharf and, therefore, after the $500.00 per package limitation of U. S. Carriage of Goods by Sea Act (46 U. S. C. §1304(5)) no longer applied?

Statement of the Case

Petitioner, John T. Clark and Son (hereinafter referred to as "Clark"), is the stevedore upon whom the courts below ultimately fixed liability for a non-negligent misdelivery of cargo.

This case was tried before the District Court sitting in admiralty under Title 28, U. S. Code, Sec. 1333, who found the following facts:

The Cunard Steam-Ship Company Limited (hereinafter referred to as "Cunard") received 29 cases of shirts at LeHavre, France, issued its bill of lading naming Penson & Company (hereinafter referred to as "Penson") as consignee, and carried the cases to New York aboard the SS TRELYON (p. 15a).*

Penson was acting as customs house broker for David Crystal, Inc. (hereinafter referred to as "Crystal"), the libelant and owner of the shipment, for the purpose of

* All page references are to the Joint Appendix filed with this Petition.

securing the clearance and release of the shirts through Customs (p. 15a).

Louis Segarra, an employee of Penson, conspired with four other men to steal the shipment of 29 cases of shirts (p. 18a).

Segarra worked in Penson's documents section. As part of his duties, Segarra issued delivery orders on baggage and in-bond shipments. Jose Perez, traffic manager of Penson, issued the delivery orders on commercial shipments such as the one here involved. Segarra also had authority to take commercial delivery orders from Perez' desk for the purpose of answering inquiries by telephone regarding the shipments covered by the delivery order (p. 40a).

On November 14, 1957, Perez received the file of documents relating to the shipment of shirts. The freight had been paid, customs clearance had been secured and the shipment was ready to be delivered to Penson by Cunard at Pier 2, Bush Docks, Brooklyn, where the SS TRELYON docked (p. 17a).

Perez prepared and signed the delivery order directed to Arrow Carriers, the truckman whom Penson designated to receive the cases of shirts at Pier 2. While Perez was away from his desk Segarra picked up the delivery order from the desk of Perez. Later that day Segarra delivered the completed delivery order and a blank form of delivery order to his co-conspirators (p. 18a).

Segarra knew that Crystal's shipments were "rush shipments". He took the completed delivery order and gave it to his fellow thieves for two reasons: to avoid the danger of having Arrow Carriers arrive at Pier 2 before the theft of the shirts was accomplished and to supply to his fellow conspirators the information needed to complete the blank order (pp. 124a and 136a).

The following morning three of the criminal conspirators filled in the blank delivery order by copying from the original except that "C. & L. Trucking" was substituted for "Arrow Carriers" (p. 17a). One of the thieves forged Perez' signature on the order and the original was then destroyed (p. 18a). The thieves then proceeded to the pier and presented the delivery order to the delivery clerk.

The vessel TRELYON arrived at Pier 2 the same day from LeHavre. Pursuant to its written agreement with Cunard, John T. Clark and Son commenced to discharge cargo from the TRELYON and to deliver the cargo to the named consignees in the bills of lading, upon advices from Cunard that the freight had been paid (p. 17a).

Twenty-eight cases of shirts were delivered to the thieves late the same afternoon. One case was set aside for Public Stores by U. S. Customs (p. 19a). The courts below found that Clark followed the normal and customary delivery procedures for terminal operators in the port of New York and that Clark was not negligent in making the delivery. *Crystal* v. *Cunard*, 339 F. 2d at page 299.

Segarra and his confederates in crime were ultimately arrested and convicted of, or pleaded guilty to the crime of conspiring to steal from a wharf goods constituting a foreign shipment (18 U. S. C. §659).

Pleadings

Crystal filed a libel against Cunard for breach of its bill of lading contract. Cunard impleaded Clark under the 56th Rule in Admiralty, claiming a right of indemnity over by reason of the alleged breach of Clark's contract with Cunard.

Clark in turn impleaded Penson under the 56th Rule in Admiralty, claiming a right over and an indemnity from

Penson by reason of Penson's negligence and breach of its obligation under the bill of lading to take proper delivery of the cargo.

At the end of the trial Crystal amended its libel to state a second cause of action in conversion against the other three parties separately and also a cause of action for breach of contract against Penson.

The District Court gave judgment in favor of Crystal against Cunard and gave Cunard a judgment over against Clark. The District Court dismissed all of the actions against Penson for lack of jurisdiction. The District Court did not pass upon Crystal's action for conversion against Clark directly. The Court of Appeals affirmed the decree.

Reasons for Granting the Writ

We submit that the reasons for granting this Petition are as follows:

Question 1. This Court, beginning with the case of *Ryan Stevedore Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124 (1956), has considered a number of questions involving the implied warranty of workmanlike performance in contracts between steamship companies and stevedores. We submit that the question raised here is a logical development of the past cases and should be considered by this Court because of its importance to the maritime industry. Most terminal operation contracts contain clauses intended to limit or define the legal responsibilities owed by the terminal operator to the steamship company. A decision on the question we seek certified here will enable both parties to such contracts to construe more definitely such clauses and their legal effect.

Question 2. The Court of Appeals has decided this question in a way which, we submit, is directly in conflict with the decision of this Court in the case of *National Safe Deposit Co.* v. *Hibbs,* 229 U. S. 391 (1913). We submit that the Court of Appeals decision constitutes a substantial departure from the law as pronounced by this Court and should therefore be reviewed by this Court.

Question 3. The Court of Appeals has decided this question contrary to the ruling of the Supreme Court in *Richardson* v. *Goddard,* 64 U. S. (23 How.) 28 (1859) and in conflict with the decisions of three Circuit Courts viz., *Calcott Ltd.* v. *Isbrandtsen Co.,* 318 F. 2d 669 (1st Cir. 1963); *North American Smelting Co.* v. *Moller SS Co.,* 204 F. 2d 384 (3rd Cir. 1953) and *Miami Structural Iron Corp.* v. *Cie Nationale Belge de T. M.,* 224 F. 2d 566 (5th Cir. 1955). This interpretation has given rise to confusion concerning an issue of considerable consequence to the shipping industry.

Question 4. By limiting the scope of the term "Act of Thieves" in the bill of lading exemption to trespassory thefts, the Court of Appeals has subjected ocean carriers and their agents to an insurer's liability for embezzlements from the piers. This holding is without legislative or judicial sanction and is contrary to the broad interpretation of the term "theft" set forth in *Edwards* v. *Bromberg,* 232 F. 2d 107 (5th Cir. 1956). As such, the interpretation of the Circuit Court warrants review by the Supreme Court.

Question 5. The issue of the validity of an agreed valuation clause less than $500 per package where the loss occurs after discharge on a wharf and therefore after the $500 per package limitation of U. S. Carriage of Goods by Sea Act (46 U. S. C. §1304(5)) no longer applied, is of great importance to the shipping industry both here and abroad. By arbitrarily establishing the $500 per package

limitation as the minimum valuation consistent with its concept of public policy, the Court of Appeals has extended the scope of the U. S. Carriage of Goods by Sea Act (COGSA) beyond its legislative boundaries (46 U. S. C. §1301(e)), and has failed to observe the judicial standards prescribed for such clauses by this Court in *Ansaldo San Georgio* v. *Rheinstrom Co.*, 294 U. S. 494 (1935).

ARGUMENT

1.

Construction of a clause of exoneration in a contract between a steamship company and a stevedore.

In 1956 this Court in the case of *Ryan Stevedore Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, held that a stevedore contractor is obligated to reimburse a shipowner for damages caused it by the contractor's improper stowage of cargo even in the absence of an express agreement by the contractor to indemnify the shipowner. Thereafter this Court had occasion to consider the scope of the stevedore's obligation of indemnity absent any contractual provision, in the cases of *Weyerhauser Steamship Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958), *Crumady* v. *J. H. Fisser*, 358 U. S. 423 (1959), *Reed* v. *Yaka*, 373 U. S. 410 (1963), and *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Co., Inc.*, 376 U. S. 315 (1964).

In the cases preceding the *Italia* case the courts below found evidence of negligence on the part of the stevedores. In the *Italia* case this Court held that the contractor's obligation covered non-negligent, as well as negligent, breaches of his implied warranty of workmanlike performance. The Court expressly withheld judgment on the question of the effect on the warranty of workmanlike performance of an

express assumption of liability for negligence by the stevedore in the contract.

The present case raises the question of the effect of an express contract provision exonerating the stevedore from liability to the steamship company for a specified breach of his implied warranty of workmanlike performance.

The instant contract, which is set forth in full at pages 414a through 428a of the Joint Appendix, does not contain an express indemnity clause. The contract, however, does contain the following exculpatory clause:

> "As terminal employees, engaged in clerical services of tallying and delivery of cargo, are selected so far as possible according to their integrity and ability, the Contractor cannot assume responsibility for losses resulting from possible theft or errors in delivery or receiving of cargo except where fraud on the part of these employees is clearly evident. However, the Contractor will indemnify and save harmless Agent against any and all cargo claims caused by theft or pilferage when such cargo is placed in the permanent pier cribs in the care, custody and control of the Contractor, and/or the care, custody and control of any protective organization engaged by Agent, and provided the Contractor's liability is not in excess of the liability of Agent to shippers, owners or consignees of such cargo, and provided further that Contractor's liability shall not be in excess of two million ($2,000,000.00) dollars."

The express indemnity clause was cancelled prior to the loss (p. 424a). While the clause clearly exonerates Clark from any liability to Cunard for "possible theft or errors in delivery or receiving of cargo," the Court of Appeals stated that "such disclaimers are not favored by the Courts and must be strictly construed." 339 F. 2d at page 300. The

Court then proceeded to distinguish between a "misdelivery", as occurred in this case, and "errors in delivery". The Court defined a "misdelivery" as an unrectified mistake in delivery, and an "error in delivery" as a mistake in delivery which is ultimately rectified. 339 F. 2d at page 300.

The Court of Appeals makes clear that this distinction is the direct product of its decision to construe the disclaimer strictly. The Court states at 339 F. 2d at page 300, as follows:

> "And because, as between Cunard and Clark, strong policy considerations favor placing responsibility for the misdelivery on Clark, any attempt to escape from that responsibility should be unequivocally expressed."

We submit that the Court's application of a rule of strict construction of the clause has no ground in either logic or policy considerations. We submit further that the distinction drawn between a "misdelivery" and an "error in delivery" strains the natural meaning of words beyond reasonable lengths.

We believe that Judge Friendly, in his dissenting opinion, best answered the argument that policy considerations favored the result achieved by the majority of the Court when he said at 339 F. 2d at page 301, as follows:

> "I likewise see no ground for invoking some artificial rule of construction to cut down on the natural meaning of the words. Whatever may be the case with contracts of adhesion, when a contract is made at arms' length between two business concerns like Cunard and Clark, there is no justification for courts looking with 'disfavor' on the allocation between them of risks from the wrong delivery of cargo on a busy pier; our duty is to read the words, in their setting, with icy neutrality.

> One of the world's great shipping lines surely does not need the help of this court in working out its contracts, and ought not get it in working out of them."

We submit that the term "errors in delivery" is completely unambiguous. We submit that the language has a simple, natural meaning which should be given effect here. As Judge Friendly said, " 'Errors in delivery' seems a completely apt way to describe delivery to a wrong person." 339 F. 2d at page 301.

Cunard and Clark are privately owned businesses. Neither commands an overpowering bargaining position vis-a-vis the other. What they agreed to in their contract affected no one but themselves. We know of no law which prohibits or disfavors the agreement considered here. 8 Am. Jur. 2d §130. Were a third party involved or were Clark in the public bailee business, considerations of public policy might prevail. 8 Am. Jur. 2d §§130, 131.

We submit that the contract between Cunard and Clark should be construed "with icy neutrality." In view of the Court's previous decisions in the area of warranties of workmanlike performance and in view of the importance of the warranties in the field of Admiralty, we respectfully urge that the question above discussed be decided by this Court.

2.

Scope of employment.

The courts below conceded that Segarra, Penson's thieving employee, had a right to have the delivery order in his possession in the course of his employment for a specific purpose. The Court of Appeals states that "Segarra was allowed to take delivery orders from Perez' desk but only

for temporary use in answering inquiries and *not* for delivery to truckmen." 359 F. 2d at page 299. Nevertheless, the Court of Appeals found that Segarra's act in taking the completed delivery order from Perez' desk was outside the scope of his employment.

We submit that the decision of the Court of Appeals is contrary to a decision of this Court in *National Safe Deposit Co.* v. *Hibbs*, 229 U. S. 391 (1913).

In the *Hibbs* case, the defendant bank held certain certificates of stock as collateral against a loan. The certificates were in the name of the lender who had executed in blank the assignment and power of attorney endorsed on the back of the certificates. One Myers was employed by the bank as general bookkeeper and assistant note teller. Part of his duties was to procure the collateral security from an officer of the bank and deliver the collateral to the lender upon repayment of the loan. He had no other authority in relation to the stock.

The secretary of the bank, at the request of Myers who intended to sell them, secured the stock certificates and gave them to Myers. Myers took the certificates, endorsed his name on the back, sold them and retained the proceeds.

This Court held that the defendant bank was liable to the lender as follows, *National Safe Deposit Co.* v. *Hibbs*, *supra*, at pages 396 and 397:

> "Here one of two innocent persons must suffer and the question at last is, Where shall the loss fall? It is undeniable that the broker obtained the stock certificates, containing all the indicia of ownership and possible of ready transfer, from one who had possession with the Bank's consent, and who brought the certificates to him, apparently clothed with the full ownership thereof by all the tests usually applied by business men

> to gain knowledge upon the subject before making a purchase of such property. On the other hand the Bank, for a legitimate purpose with confidence in one of its own employees, entrusted the certificates to him, with every evidence of title and transferability upon them. The Bank's trusted agent, in gross breach of his duty, whether with technical criminality or not is unimportant, took such certificates, thus authenticated with evidence of title, to one who in the ordinary course of business sold them to parties who paid full value for them. In such case we think the principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible."

Penson entrusted delivery orders to Segarra for a legitimate purpose also. But the Court of Appeals found that "the law limits vicarious liability to situations where the wrongdoing can be traced to abuse of more carefully defined authority." 339 F. 2d at page 299. We do not understand the *Hibbs* case to place any such limitation on the scope of vicarious liability. We submit that the Court of Appeals is in error on this point.

We submit also that the cases relied upon by the Court of Appeals at 339 F. 2d at page 299 of its opinion are not in point. Each case involves an employee who had *access* to the document involved, but did not have the right to have the document *properly in his possession* in the course of his employment.

We respectfully point out to this Court that the removal of the completed delivery order from its normal course of handling was a vital part of the scheme or thievery. The thieves needed the information on the order to prepare the forgery and they had to prevent the original document from reaching the proper truckman. Otherwise, the danger of

the proper and bogus truckmen meeting at the pier was a near certainty.

We also call the Court's attention to the case of *Gleason* v. *Seaboard Air Line Railway Co.*, 278 U. S. 349 (1929).

In the *Gleason* case, one McDonnell was an employee of the railroad whose duty was to give notice to those engaged in the cotton trade of the arrival of cotton at the railroad's Savannah terminal under "Order Notify" bills of lading. McDonnell forged and negotiated a bill of lading and draft showing a shipment of cotton from Charleston to Savannah. McDonnell notified plaintiff of the arrival of cotton under a forged order notify bill of lading. Relying upon the notice given by McDonnell, plaintiff paid the draft when presented by a local bank. Plaintiff brought suit against the railroad upon discovery of the fraud. The railroad sought to excuse itself, because of its employee's criminal intent, from the general rule that a principal is responsible for his agent's act done within the scope of his employment and without his principal's knowledge, consent or neglect. This Court rejected that contention at page 357, as follows:

> "Granted the validity and general application of the rule itself, there would seem to be more reason for creating an exception to it because of the agent's secret purpose to benefit himself or his breach of duty than in any other case where his default is actuated by negligence or sinister motives. In either case the injury to him who deals with the agent, his relationship and that of the principal to the agent's wrongful act, and the economic consequence of it to the principal in the conduct of whose business the wrong was committed, are the same."

The Court of Appeals admitted that "the chain of estoppel is firmer and shorter here than in MacAndrews [*MacAndrews & Forbes Co.* v. *United States*, 23 F. 2d 667 (3rd Cir. 1928)], where an owner of furs was estopped from recovering from a carrier by imputing to the owner the negligence of a trucking firm employed by his customs broker." 339 F. 2d at page 299. In *MacAndrews*, the truckman placed the delivery order in an unlocked drawer of his desk in his office overnight and it was stolen by thieves during the night.

We submit that the decision of the Second Circuit Court of Appeals in this case is inconsistent with the decision of the Third Circuit in the *MacAndrews* case.

For other cases bearing directly on this point we respectfully refer this Court to the cases of *Henry* v. *Auchincloss, Parker & Redpath*, 193 F. Supp. 413 (D. D. C. 1961), affd. 305 F. 2d 753 (D. C. Cir. 1962); *Salomon, Stern Co., Ltd.* v. *Davis*, 292 Fed. 221 (S. D. N. Y. 1923); *May Department Stores Co.* v. *Louisville & N. R.R.*, 177 Mo. App. 693, 160 S. W. 527 (1913).

We submit that the Court of Appeals for the Second Circuit has decided this case contrary to the decisions of this Court and that this Court should grant our petition for the purpose of correcting the error below.

3.

Proper delivery.

The Court of Appeals held that the ocean carrier, Cunard, did not make a "proper delivery", as required by the Harter Act, 46 U. S. C. §190, despite the fact that Cunard safely discharged the cargo on a pier into the custody of a terminal operator and gave reasonable notice of arrival

to the consignee. The bill of lading provided that the cargo was "to be delivered * * * from the ship's deck where the Shipowner's responsibility shall cease * * *."

In holding that the delivery was improper and insufficient to relieve the carrier from liability and that this clause was void under the Harter Act, the Court of Appeals disregarded a well settled principle of maritime law that was first established by the Supreme Court more than 100 years ago. *Richardson* v. *Goddard*, 64 U. S. (23 How.) 28 (1859), *The EDDY*, 72 U. S. (5 Wall.) 481, 495 (1866), *Constable* v. *National SS Co.*, 154 U. S. 51 (1894).

This rule has been confirmed again in three Court of Appeals' decisions which are all at variance with the decision of the Court of Appeals for the Second Circuit in the instant suit.

In *Calcot, Ltd.* v. *Isbrandtsen Co.*, 318 F. 2d 669 (1st Cir. 1963) cargo was discharged on a Municipal dock and later damaged by fire. A clause in the contract of carriage provided in substance that when the goods had been discharged on a wharf they were deemed "to have been delivered and at their own risk and expense." Judge Woodbury held that there had been a proper delivery as required by the Harter Act and that the bill of lading stipulation was valid and enforceable. He stated the law as follows at page 673:

> "It has long been a settled rule of general maritime law that a sea carrier's liability ends when delivery is on the wharf and suitable and reasonable notice of arrival is given the consignee so as to afford him a fair opportunity to remove the goods or put them under proper care and custody.
>
> * * * * *

"Nevertheless, the third paragraph of Sec. 15, quoted hereinabove, clearly evidences an intention to accelerate delivery to the earliest moment consonant with the general maritime rule; and to that extent we see no reason why the carrier should not have the benefit of this stipulation. In any event, as the case of Isthmian Steamship Co. v. California Spray-Chemical Corp., 300 F. 2d 41, 43 (9th Cir. 1962), clearly states, it is the general maritime rule which determines whether there has been 'proper delivery' so as to terminate the applicability of the Harter Act. And, as noted earlier, the appellants' argument that it was erroneously assigned the burden of proving the appellees' negligence is based upon the applicability of the Harter Act and so must fall with it upon a finding of 'proper delivery.'

"After proper delivery at the wharf Isbrandtsen's duty as a carrier with respect to the goods was at an end. Thereafter it or its agents could be liable for damage to the cotton only in the same way and to the same extent as any stranger to the contract of carriage. There being ample evidentiary support for the court's conclusion that the plaintiffs had not affirmatively shown any negligence on the part of any of the defendants, its judgment was proper."

Similarly, in *North American Smelting Co.* v. *Moller SS Co.*, 204 F. 2d 384 (3d Cir. 1953) a consignee was not permitted to recover from a shipowner for lost cargo presumably stolen from a pier owned and operated by an independent terminal operator. Judge Goodrich, in dismissing the libel, stated at page 386:

> "'There is no doubt that in discharging the cargo onto the pier and notifying the consignee the carrier was no longer in possession of the goods so as to suffer the risk of loss not due to any negligence on its part.'"

See also, *Miami Structural Iron Corp.* v. *Cie Nationale Belge de T. M.*, 224 F. 2d 566 (5th Cir. 1955).

It is submitted that the decision of the United States Court of Appeals for the Second Circuit in the present case is contrary to the decisions of the Supreme Court and it is also in conflict with the decisions of the First, Third and Fifth Circuits cited above.

4.

The theft clause of the bill of lading.

The Court of Appeals found that the goods were "misdelivered * * * upon the presentation of a forged Penson [agent of the consignee] delivery order obtained through the complicity of one of Penson's employees." Neither the District Court nor the Court of Appeals found that either Cunard or Clark was negligent. The uncontested facts establish that the loss occurred as a result of an embezzlement or larceny by trick which is included within the meaning of the word "theft". *Edwards* v. *Bromberg*, 232 F. 2d 107 (5th Cir. 1956). As such, neither Cunard nor Clark are legally responsible for the loss and it was error for the Court of Appeals to hold Cunard responsible and Clark indirectly liable in this regard. This is particularly true because pursuant to the third article of the bill of lading, Cunard exempted itself from liability for the "Act of Thieves". Such a clause is valid. In *Cunard SS Co.* v. *Kelly*, 115 Fed. 678 (1st Cir. 1902), cert. den., 193 U. S. 670 (1904) it was held that a shipowner was entitled to the benefit of a similar exemption from liability unless it was found that the shipowner's negligence or fault contributed to the loss. In upholding the clause Judge Brown stated at page 686:

> "So, also, a general exemption against thieves is valid, and is not to be construed as including or applicable to a case where there was negligence on the part of the ship which contributed to the theft, or facilitated it. (The Saratoga (D. C.), 20 Fed. 869."

See also *The Poznan,* 276 Fed. 418, 431 (S. D. N. Y. 1921).

The Court of Appeals erred in characterizing the loss as "more appropriately * * * a misdelivery rather than a theft". It recognized that a taking by false pretenses is a larceny but it refused to extend the plain meaning of the word "theft" beyond a "trespassory" larcenous taking.

It is submitted that such an exercise of semantics does violence to the plain meaning of the word "theft" and is an unwarranted dilution of the legal effect of a proper exemption contained in all bills of lading in the shipping industry.

5.

The agreed valuation clause.

The contract of carriage contained a clause by which the shipper and the carrier agreed that the value of each package shipped " * * * does not exceed £20 or its equivalent in American currency on which basis the freight is adjusted and the carrier's liability shall in no case exceed that sum per package. * * * " Since the loss in question occurred after discharge on the pier, the $500. per package limitation of the COGSA, 46 U. S. C. §§1301(e), 1304(5) did not apply. We submit that the parties were free to agree upon a valuation clause covering a loss while the goods were on the pier provided it met the general standards for such an agreement set forth by the Supreme Court in *Ansaldo San*

Georgio v. *Rheinstrom Co.*, 294 U. S. 494 (1935), at pp. 496 and 497 as follows:

> "It recites that a sum named in the bill of lading is the agreed value of the goods, or their value per unit or per package, in the absence of the shipper's declaration of a higher value; that the rate is fixed with reference to the specified value, and if a greater be declared a high rate will apply; that in consideration of the rate to be charged, the carrier's liability for loss or damage shall be limited to the stipulated value. * * * Agreements of this kind are held to be reasonable and not offensive to the public policy against contracts relieving the carrier from its own negligence. The agreement as to value in consideration of carriage at the lower rate thus obtained, is held to estop the shipper from demanding damages in excess of the agreed value."

The Court of Appeals held the £20 per package valuation clause to be invalid partly because of COGSA which does not permit limitations under $500. per package and partly because it found the bill of lading amount to be "such an arbitrarily small fund that it should be void as contrary to public policy." It is submitted that the Court of Appeals was clearly wrong on both points. Although COGSA does contain a $500. provision, this applies only during the period that the goods were on board the vessel and by statute does not apply after discharge on the pier. 46 U. S. C. §1301(e). COGSA is, therefore, not applicable to the present loss.

Whatever discrepancy there may be between the bill of lading figure and the market value of each package is immaterial. It is purely a question of freight rates and any shipper who wishes to recover in full in the event of a loss is free to protect himself by paying the appropriate *ad valorem* freight rate. This was clearly brought out in

Isbrandtsen Company v. *U. S.*, 201 F. 2d 281 (2nd Cir. 1953) where the court stated at page 285:

> "Nor does the fact that the value agreed upon was only a fraction of the actual value of the locomotives invalidate the clause. Pierce Co. v. Wells, Fargo & Co., 236 U. S. 278, 285 * * * ; see Frederick Leyland & Co. v. Hornblower, 1 Cir., 256 Fed. 289, 293-294. So long as a higher valuation could have been secured and there was no fraud on the part of the carrier, the provision is not unreasonable or unconscionable. * * * "

Similarly in *Frederick Leyland & Co.* v. *Hornblower*, 256 Fed. 289 (1st Cir. 1919), the bill of lading provided:

> "Not accountable for any goods of whatever description beyond the sum of 20 pounds per package, unless the value be herein expressed and extra freight as may be agreed on paid."

The Court's determination that the £20 limitation is "such an arbitrarily small sum that it should be void as contrary to public policy" is contrary to this Court's long-standing recognition of the validity of agreed valuation clauses where, as here, a choice of freight rates is available.

CONCLUSION

It is respectfully submitted that this is an appropriate case for the exercise of this Court's certiorari jurisdiction.

Respectfully submitted,

HORACE T. ATKINS
Proctor for Petitioner
70 Pine Street
New York, N. Y. 10005

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 8—September Term, 1964.

(Argued October 19, 1964 Decided December 9, 1964.)

Docket No. 28656

DAVID CRYSTAL, INC.,

Libellant-Appellant-Appellee,

—v.—

THE CUNARD STEAM-SHIP CO. LTD.,

Respondent-Petitioner, Appellant-Appellee,

—and—

JOHN T. CLARK & SON,

Respondent-Impleaded-Petitioner-Appellant-Appellee,

—and—

PENSON & Co.,

Respondent-Impleaded Appellee.

Before:

FRIENDLY, KAUFMAN and ANDERSON,

Circuit Judges.

Appeal from an interlocutory decree of the United States District Court for the Southern District of New York, Richard H. Levet, *Judge,* sitting in admiralty, granting

David Crystal, Inc. judgment against The Cunard Steam-Ship Co. Ltd., and The Cunard Steam-Ship Co. Ltd. judgment over against John T. Clark & Son, including attorneys' fees and disbursements, denying David Crystal, Inc. recovery against John T. Clark & Son, and dismissing the claims of David Crystal, Inc. and John T. Clark & Son against Penson & Co. for lack of jurisdiction.

Affirmed.

JOHN L. QUINLAN, of Bigham, Englar, Jones & Houston, New York, N. Y., *for libellant-appellant-appellee.*

HENRY C. BLACKISTON, of Lord, Day & Lord, New York, N. Y. (John F. O'Connell, Franklin G. Hunt, on the brief), *for respondent-petitioner-appellant-appellee.*

WILLIAM WEYMAR, JR., of Atkins & Weymar, New York, N. Y. (Joseph B. McDonald, on the brief), *for respondent-impleaded-petitioner-appellant-appellee.*

ENRICO S. SANFILIPPO, New York, N. Y., *for respondent-impleaded-appellee.*

KAUFMAN, *Circuit Judge*:

Our problem on this appeal, not devoid of reticulate aspects, is to determine which one of four parties shall bear the loss for the misdelivery of twenty-eight cases of shirts: the buyer and owner David Crystal, Inc., the carrier Cunard Steam-Ship Co. Ltd., the carrier's stevedore John T. Clark & Son, or the buyer's customs broker Penson & Co. After a trial in admiralty, the District Court granted Crystal recovery from Cunard and recovery over by Cunard

from Clark, but denied Crystal direct recovery from Clark and dismissed Crystal's and Clark's claims against Penson for lack of admiralty jurisdiction. Crystal, Cunard, and Clark appeal from those portions of the decree adversely affecting their respective interests. We uphold the decree placing the ultimate responsibility for the loss upon Clark and find it unnecessary, because of this result, to reach the jurisdictional questions raised by the claims against Penson.

The basic facts may be stated simply enough although the resolution of liability is quite complex. Clark unloaded the shirts from Cunard's vessel to a pier in Brooklyn, N. Y., and then misdelivered them upon the presentation of a forged Penson delivery order, obtained through the complicity of one of Penson's employees.

For a full understanding of the ramifications of this case, however, a further exposition of the facts is in order. On October 31, 1957, Cunard received the shirts purchased by Crystal at Le Havre, France, for shipment aboard its vessel, the SS Trelyon. The bill of lading named Penson, Crystal's customs broker, as consignee. On November 14, after Penson received Cunard's arrival notice and obtained clearance from Customs, the file folder relating to the shipment was given to one Jose Perez, its traffic clerk. Perez prepared and signed a delivery order naming a trucker, Arrow Carriers, as agent to accept delivery at the pier. He affixed the order to the outside of the folder and placed it on his desk with other completed orders destined for the outgoing mail basket.

But shortly after Perez performed this task, the chain of events intended to effect proper delivery of the shirts to Crystal was cut at one of its most vital links. It appears that as Perez momentarily left his desk, Louis Segarra, a fellow employee who had been plotting with outsiders to steal the valued shirts, surreptitiously took the delivery

order, together with a blank form. He gave the original and blank orders to Rigley, a confederate, who together with one Orlando, filled out the blank order, inserting the name of a fictitious trucker, C&L Trucking Co., in place of Arrow. They also forged Perez' signature on the new delivery order and destroyed the original.

The next morning Rigley and Orlando appeared at the pier where Clark's stevedores were unloading the Cunard vessel. They presented the forged delivery order to Keane, Clark's chief delivery clerk, and then waited until late in the afternoon while the documents were checked and the shirts loaded on their truck.[1]

Crystal soon discovered its loss and commenced this suit by filing its libel against Cunard for breach of the contract of ocean carriage. Cunard then impleaded Clark seeking indemnity for breach of its stevedoring contract. Clark, in turn, impleaded Penson claiming negligence on its part. Both Clark and Penson answered the libel although Crystal did not assert causes of action against either until amendments to the libel were permitted by the judge upon conclusion of the trial.

The District Court held, as we have already indicated, that Cunard was fully liable to Crystal, but was entitled to be indemnified by Clark. We turn now to examine each phase of that conclusion.

I. *Crystal* v. *Cunard*

Because Crystal's claim against Cunard was for breach of the contract of ocean carriage, we must look first to the

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1 Although Clark followed customary procedures in delivering the shirts, hindsight indicates that if its employees had been more alert, the conspiracy would have been foiled. For example, although Keane had never before seen a delivery order naming C&L Trucking, he made no inquiry of this and other suspicious circumstances and did not act to verify the indecipherable forged signature on the delivery order.

bill of lading to determine the parties' rights and duties. The District Court was of the opinion that the bill of lading became inoperative once the cargo was discharged. We believe, however, that it is more precise to say that although the bill continued to govern the parties' relationships after discharge, its terms did not insulate Cunard from liability. It is true that the bill provided that Cunard's responsibility would cease when delivery was made from the ship's deck and that if the consignee did not immediately receive the goods, Cunard could simply abandon them on the wharf. But these clauses were clearly null and void under the Harter Act's restrictions against certain stipulations seeking to relieve carriers from liability. 46 U. S. C. §190.

The bill of lading also provided that Cunard had the option to land or store the cargo "at the sole expense and risk of Consignee in the Warehouses provided for that purpose." But it is clear that Cunard did not take advantage of that option, for it discharged the goods in the custody of its stevedore on a pier and did not deposit them in a warehouse.

Since the bill of lading did not specify Cunard's obligations when it discharged the shirts to Clark, the law steps in to fill the lacuna; this it does by properly characterizing Cunard's status as a bailee. Cf. *The Italia*, 187 Fed. 113 (2d Cir. 1911); *Standard Brands, Inc.* v. *Nippon Yusen Kaisha*, 42 F. Supp. 43 (D. Mass. 1941). And there is no sound reason to alter its bailee status simply because it landed the shirts on Clark's pier. Absent a valid contract to the contrary, a bailee remains liable for the safety of the goods in whatever hands he may place them; exceptions that may arise when a consignee fails to accept the goods have no relevance to this case. Cf. *The Eddy*, 72 U. S. 481, 495 (1867).

It is interesting that there is no direct precedent in the law of admiralty establishing the standard of responsi-

bility of a bailee who misdelivers cargo. Because of this void and mindful that maritime law draws on many sources, the able District Court judge in order to shape the appropriate maritime law properly resorted to state decisional law, see 1 Harper & James, Torts 156 (1956), various uniform acts, including the Federal Bills of Lading Act, 49 U. S. C. §§81-124, as well as the Uniform Commercial Code, and finally fastened appropriately on the rule articulated in the Restatement, Torts §234 (1934).

The Restatement rule suggests that a bailee is absolutely liable for misdelivering cargo, unless his mistake as to the person entitled to receive the goods was induced by the bailor. We agree with the District Court that considerations of uniformity and the need for certainty in commercial transactions justified application of this widely accepted rule to maritime transactions. It is not prudent to have a rule which varies a bailee's liability depending upon his proximity to the sea and susceptibility to admiralty's jurisdiction. At the same time, the rule of absolute liability represents a sound allocation of responsibility, for the bailee is in a better position than the bailor to establish procedures to minimize the risk of misdeliveries and to insure against the few misdeliveries that will inevitably occur despite the most careful precautions.

Cunard was therefore absolutely liable for the misdelivery unless (a) certain bill of lading provisions not yet considered eliminated or reduced such liability or (b) the misdelivery was induced by Crystal or Penson, acting in its behalf. One of these provisions, the exception for acts of "thieves," seems to us inapplicable because the loss of the cargo here is more appropriately characterized as due to misdelivery rather than theft. It is true that under New York law a taking by false pretenses is larceny, Penal Law §1290, but we do not believe that the broad definition of theft in the criminal law should be extended to a com-

mercial contract. See *Freedman* v. *Geo. W. Bush & Sons Co.*, 284 Pa. 16 (1925). The law already recognizes this distinction for a warehouseman is absolutely liable for misdeliveries but is responsible in trespassory theft cases only where he has been negligent. See *North American Smelting Co.* v. *Moller S.S. Co.*, 204 F. 2d 384 (3d Cir. 1953). These differing standards are based on sound policy considerations since it is proper that a warehouseman should bear a greater responsibility for being duped by false pretenses than for thefts that cannot be avoided despite the exercise of ordinary care.

Cunard's attempt elsewhere in the bill of lading, to limit its liability to £20 per package also must fail. This clause was clearly void while the goods were at sea, for the Carriage of Goods by Sea Act (COGSA), 46 U. S. C. §1304(5), does not permit limitations under $500. It seems to us that once the law declared this clause void it should remain void forever. It would be unfair to permit the void clause to spring to life once the goods reached land, for by then Crystal had justifiably relied on the clause's inapplicability in making its decision on adequate cargo insurance. Moreover, the limitation provision in the bill of lading does not explicitly cover post-arrival damage. Furthermore, the £20 limitation, when contrasted with COGSA's $500 figure, is such an arbitrarily small sum that it should be void as contrary to public policy. Cf. *Isbrandtsen Co.* v. *United States*, 201 F. 2d 281 (2d Cir. 1953).

We turn, finally, to what is for us the most troublesome question on this phase of the case: whether Crystal is stopped from recovering because the misdelivery was induced by Penson's alleged negligence. The law is clear that if Penson's negligence caused the misdelivery, Crystal would be barred from recovery. *MacAndrews & Forbes Co.* v. *United States*, 23 F. 2d 667 (3d Cir. 1928). Indeed, the chain of estoppel is firmer and shorter here than in *Mac-*

Andrews, where an owner of furs was estopped from recovering from a carrier by imputing to the owner the negligence of a trucking firm employed by his customs broker. We are not inclined to upset the District Court's holding that Penson could not be faulted for its office procedures or for hiring and retaining Segarra. The key issue on this question is whether Segarra was acting within the scope of his authority when he took the valid delivery order and the blank form from Perez' desk.

As we read the record, Segarra's authority to prepare and sign delivery orders and hand them to truckmen did not extend to the commercial shipment involved in this case. Segarra was allowed to take delivery orders from Perez' desk but only for temporary use in answering inquiries and *not* for delivery to truckmen. While it is true that by trusting Segarra to this limited extent Penson may have facilitated the plot, we are unwilling to stretch the tenuous line of causation and say that Penson "proximately caused" the misdelivery. See *Saugerties Bank* v. *Delaware & Hudson Co.*, 236 N. Y. 425 (1923). Similarly, despite Segarra's authority to take the blank form, it seems clear that this authority did not extend to completing the form; a forgery by a mere custodian of documents is not binding on the principal. See, e.g., *Ehrich* v. *Guaranty Trust Co.*, 194 App. Div. 658, 186 N. Y. Supp. 103 (1921), aff'd, 233 N. Y. 637 (1922); *Manhattan Life Ins. Co.* v. *Forty-Second Street & Grand St. Ferry R.R. Co.*, 139 N. Y. 146 (1893).

A sound reason stands behind our holding that Segarra was not acting within the scope of his employment in the circumstances present here. If an employer were to be held liable every time an employee took advantage of a general authority to move freely about his offices, he would be placed in the role of an absolute insurer without the ability to protect himself. Instead, the law limits vicarious liability to situations where the wrongdoing can be traced

to abuse of a more carefully defined authority. Here, it is clear that Segarra's actions were not sufficiently related to his delegated authority and for that reason Penson cannot be charged with responsibility for the misdelivery.

II. *Cunard* v. *Clark*

We also agree with the District Court's holding that Clark must indemnify Cunard because the misdelivery was a breach of its implied warranty of workmanlike service. The Supreme Court recently indicated, in *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964), that the implied warranty may be breached even where, as here, there has been no showing of negligence on the stevedore's part. Surely, Clark was in a far better position to prevent the misdelivery than Cunard and liability should properly fall upon the party who is best situated to adopt protective measures.

It is true that Clark's contract with Cunard disclaimed responsibility for "losses resulting from possible theft or errors in delivery." But such disclaimers are not favored by the courts and must be strictly construed. See 2 Harper & James, Torts §28.25 (1956); 78 Harv. L. Rev. 191 (1964); cf. *Pettus* v. *Grace Line, Inc.*, 305 F. 2d 151, 155 (2d Cir. 1962). Somewhat similar considerations of strict construction led us to hold that a theft exception in Cunard's bill of lading, also found in the Clark-Cunard agreement, did not apply to the facts of this case. And because, as between Cunard and Clark, strong policy considerations favor placing responsibility for the misdelivery on Clark, any attempt to escape from that responsibility should be unequivocally expressed. We are not disposed to extend the agreement's exemption of "errors in deliveries" to "misdeliveries." A "misdelivery" in maritime practice is a technical term of art applied where there is a complete failure

to deliver goods to the owner, consignee, or other authorized holder of a bill of lading. Although the term "errors in delivery" is unfamiliar in this context, we are inclined to limit it to delays, incomplete deliveries, or deliveries of the wrong cargo that are ultimately rectified. Indeed, the very novelty of the expression explains our reluctance to treat it as synonymous with "misdeliveries," the term that naturally leaps to mind to characterize what happened here.

We believe Cunard is also entitled to reimbursement from Clark for attorneys' fees and disbursements incurred in defending against Crystal's claim. See *Paliaga* v. *Luckenbach S.S. Co.*, 301 F. 2d 403 (2d Cir. 1962). We cannot accept the stevedore's suggestion that Cunard should be denied recovery because it could have avoided these expenses by asking Clark to defend the action on its behalf. Crystal sued Cunard only and when Cunard impleaded Clark it invoked the personal defenses already discussed against Cunard. Because those defenses were substantial and might have succeeded, Cunard's only safe course was to defend against Crystal's claims. Having forced Cunard into this position, Clark cannot now be heard to say that it should not be charged for litigation expenses unnecessarily incurred.

III. *Crystal* v. *Clark*

In light of the foregoing dispositions, which we have approved, the District Court judge saw no need to consider Crystal's direct claim against Clark, added by post-trial amendment. We recognize that because we affirm Crystal's judgment against Cunard and Cunard's against Clark, the question whether Crystal should be allowed to recover against Clark as well becomes academic. Indeed, because the issue lacks practical significance in this case, we accept without detailed analysis and discussion the authorities that impose jurisdictional obstacles to such direct recovery,

see 1 Benedict, Admiralty, §2, at 2 & n. 4 (6th ed. Knauth 1940); 3 Moore, Federal Practice ¶14.20, at 669-70, and ¶14.27[1], at 721 & n. 1 (2d ed. 1963), despite our observation that adherence to those precedents often needlessly fragments law suits and might deserve further consideration in the appropriate case.

IV. *Crystal* v. *Penson; Clark* v. *Penson*

In view of the conclusions we have reached, which are founded in part on Penson's freedom from responsibility for the misdelivery, the issues raised by the claims against Penson become wholly academic. Accordingly, we see no need to discuss the District Court's disposition of the jurisdictional problems raised by those claims.

The interlocutory decree is affirmed.

FRIENDLY, *Circuit Judge* (concurring and dissenting):

I join in the portions of the opinion dealing with the claims of Crystal against Cunard and Clark and with the claims of all three against Penson. But I disagree with the refusal to give effect to what seems entirely clear exculpatory language in the contract between Cunard and Clark.

The full language from the contract we must construe is set out in the margin, Clark being described as "Contractor" and Cunard as "Agent."[1] Endeavoring to put

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1 "As terminal employees, engaged in clerical services of tallying and delivery of cargo, are selected so far as possible according to their integrity and ability, the Contractor cannot assume responsibility for losses resulting from possible theft or errors in delivery or receiving of cargo except where fraud on the part of these employees is clearly evident. However, the Contractor will indemnify and save harmless Agent against any and all cargo claims caused by theft or pilferage when such cargo is placed in the permanent pier cribs in the care, custody and control of the Contractor, and/or the care, custody and control of any protective organization engaged by Agent, and provided the Contractor's liability is not in excess of the liability of Agent

myself in the place of a draftsman not endowed with hindsight, I do not see how he could realistically have been expected to do better in disclaiming liability for the loss that here occurred. Not content to rely solely on bare words of disclaimer, he placed the problem in its business setting. Clark told Cunard that it would try to hire terminal employees of "integrity and ability"; that it would be liable for losses resulting from their lack of integrity; but that it would not be liable for losses resulting from "theft," save as expressly provided in the second sentence, or from "errors"—the latter clearly arising from lack of "ability" of the employees and the former possibly so. Clark would naturally have thought that with this protection it could rely on the usual fidelity bond against fraud by its employees, on a $2,000,000 liability policy tailored to the risks of theft for which it had accepted responsibility, and on a $2,000,000 policy required by another clause to cover damage to property resulting from its negligence. Other risks remained with Cunard, which would insure or self-insure against them. We now frustrate this well articulated contractual plan and bestow a windfall on Cunard or its insurer because the draftsman did not also use the talismanic word "misdeliveries"—"the term that naturally leaps to mind to characterize what happened here."

I must assume it would have leapt to my brothers' minds, but I doubt it would have to mine. Even after the education from which I have now benefited, "errors in delivery" seems a completely apt way to describe delivery to a wrong person. I fail to understand why, as a matter of language, although deliveries at a wrong time or to a wrong place or other wrong deliveries that are ultimately rectified would be "errors in delivery," unrectified deliveries to a wrong

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to shippers, owners or consignees of such cargo, and provided further that Contractor's liability shall not be in excess of two million ($2,000,000.00) dollars. . . ."

person are not. I am equally unable to comprehend on what basis, especially in view of the explanatory language at the beginning of the clause, Clark should be thought to have been at pains to exclude liability for small errors in delivery, e.g., delays, while accepting liability for large ones, or how Cunard could have reasonably supposed this to be the effect of the words used. If the draftsman had employed a long string of words as was the style a half century ago, omission of the one considered most technically apt might indeed be thought significant; but one good reason for not using ten words where one will do is to prevent argument of that sort.

I likewise see no ground for invoking some artificial rule of construction to cut down on the natural meaning of the words. Whatever may be the case with contracts of adhesion, when a contract is made at arms' length between two business concerns like Cunard and Clark, there is no justification for courts looking with "disfavor" on the allocation between them of risks from the wrong delivery of cargo on a busy pier; our duty is to read the words, in their setting, with icy neutrality. One of the world's great shipping lines surely does not need the help of this court in working out its contracts, and ought not get it in working out of them. *Pettus* v. *Grace Line, Inc.*, 305 F. 2d 151, 155 (2 Cir. 1962), held that an agreement of a stevedore to be liable for negligence and to carry insurance against it did not negate the implied obligation to perform workmanlike services "in the absence of an express disclaimer"; that decision is not apposite here, and a text discussion of disclaimers on products liability is even less so. To be sure, disclaimers must be clear enough for a reasonable man to understand; but that does not mean that courts ought read them as they used to read indictments, where the omission of any word was fatal.

Opinion of the Court of Appeals

ANDERSON, *Circuit Judge* (concurring):

I concur in Judge Kaufman's opinion except that on the troublesome question of Clark's liability to Cunard, I reach the same result by a somewhat different approach.

In broad aspect Cunard had a continuing duty, as bailee, until the cargo was delivered to its consignee or the consignee's authorized agent. In contracting to take over the care and custody of the cargo and to deliver it to the consignee or its agent, Clark was fully aware, both from Cunard's purpose in making the contract and from Clark's own position as warehouseman, that it, Clark, was assuming the duties of a bailee. It must further have understood that these duties included delivery of the cargo to the right person, and that it could be held liable for failing to make that delivery even in case the cargo was converted to another's possession through no fault of Clark's. Restatement of Torts, §234. In an arm's length contract Clark and Cunard agreed upon certain exculpatory clauses which limited the absolute nature of the bailee's liability imposed by law. As such, these clauses must be narrowly construed. 8 Am. Jur. 2d §142.

So regarded, I do not believe that the first sentence of ¶XXV of Clause 3 of the Cunard-Clark contract (printed in Footnote 1 of the dissenting opinion, *supra*) should be interpreted to relieve Clark of the responsibility for the loss of the cargo in this case. That sentence is concerned solely with "possible theft" or "errors in delivery" *caused* by acts of *Clark's employees*. It does not mean that Clark is relieved of responsibility for all losses from theft or all losses from errors in delivery. The *cause* of the loss in this case was a larceny by trick perpetrated by Segarra and his associates. It was not perpetrated by any act of knavery or stupidity on the part of Clark's employees. The employees were duped by Segarra, and the wrong delivery was

an innocent mistake. Although the trial court mentioned the fact that Clark's delivery-clerk had never seen a delivery order naming C & L Trucking and couldn't make out the signature on it, the court did not find negligence on the part of Clark's employees. There was no system of filing and comparing signature cards and Clark's procedure throughout was found to be consistent with that customarily followed by the stevedoring industry. At most Clark's employees failed to detect and prevent the trickery of Segarra, *et al.* I do not believe, for example, that if a thief broke into Clark's warehouse to steal merchandise and got away with it, because Clark's watchman was at the crucial moment looking the other way, Clark could escape responsibility on the ground that the theft resulted from the watchman's failure to see the thief.

The trial court found that Clark misdelivered the cargo and was liable for it, not because of the limited ability of its employees to detect larceny by trick or for some negligent act on their part, but because of Clark's absolute liability as a bailee unrelieved by any exculpatory clause of the agreement. The decree of the court below in sustaining Cunard's claim of indemnity against Clark should be affirmed.

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FILED
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JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1964

No. 965

DAVID CRYSTAL, INC.,

Respondent,

against

THE CUNARD STEAM-SHIP COMPANY LIMITED,

Respondent,

against

JOHN T. CLARK AND SON,

Petitioner,

and

PENSON & COMPANY,

Respondent.

BRIEF OF RESPONDENT, PENSON & COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM J. TILLINGHAST, JR.,
Proctor of Respondent,
Penson & Company,
55 Liberty Street,
New York, New York 10005.

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BRIEF OF RESPONDENT, PENSON & COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, Penson & Company (hereinafter referred to as "Penson"), opposes the granting of the writ of Certiorari sought by the petitioner, John T. Clark and Son (hereinafter referred to as "Clark"), insofar as it pertains to Penson as said petition does not give rise to any issue affecting Penson.

The only issue in this action which directly affects Penson is the ruling of the trial court that it had no jurisdiction over the claims asserted against Penson either by Clark's impleading petition or by the amended libel of David Crystal, Inc. (pp. 43a-53a, Joint Appendix filed herein). The Court of Appeals did not disturb this ruling and saw no need to discuss the jurisdictional problems arising therefrom as they had become academic in view of its prior conclusions, which include Penson's freedom from responsibility for the misdelivery (p. 11a, Appendix to Clark's Petition).

Clark accepts this ruling and affirmance by the courts below by failing to raise the question of jurisdiction in its petition, and, as a result, there is no issue before this Court which involves Penson. There being no issue, there can be no review and, therefore, Clark's petition must be denied as to Penson regardless of whether or not it is granted as to the others. (Supreme Court Rule 38; *Helis* v. *Ward* (1939), 308 U. S. 365, 60 S. Ct. 283; *Prudence Co.* v. *Fidelity & Deposit Co.* (1936), 297 U. S. 198, 56 S. Ct. 387).

Respectfully submitted,

WILLIAM J. TILLINGHAST, JR.,
Proctor of Respondent.
Penson & Company,
55 Liberty Street,
New York, New York 10005.